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IN THE

Supreme Court of the United States

October Term, 1957

No. 999

ROSALIND SLADE, *et al.*,

Petitioners,

—v.—

BOARD OF EDUCATION OF HARFORD COUNTY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on February 12, 1958.

Citations to Opinions Below

The opinions of the District Court are reported at 146 F. Supp. 91 and 152 F. Supp. 114 *sub nom. Moore* v. *Board of Education of Harford County;* the opinion of the Court of Appeals is reported at 252 F. 2d 291. These appear in the Appendix *infra*, at pp. 21, 33 and 17 respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on February 12, 1958 (App. p. 17).[1] The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented

Whether respondent public school officials met the constitutional burden of demonstrating adherence to this Court's direction of proceeding "with all deliberate speed" where their plan of desegregation—commencing in 1956 and extending to 1963—was delayed over that period of time because of alleged community opposition, overcrowding, and the so-called incapacity of all but specially certified Negro students to adjust to high school if admitted above the first year; while the record demonstrates that there was adequate space for Negro students and that white transferees above the first high school year need not be so certified.

Statement

This cause has been in litigation since 1955. There have been two connected suits involving four judicial hearings, a court required appeal to the State Board of Education and a number of hearings before local school officials. This cause commenced with an earlier (separate) action, see 146 F. Supp. 91, brought on behalf of some of the petitioners here to desegregate the schools in Harford County. Two days before that trial respondents adopted a resolution stating that

[1] "App." refers to the Appendix to this petition. "App. R." refers to petitioner's Appendix Record used below and filed as the record with this petition.

> "any child regardless of race may make application to the Board of Education to be admitted to a school other than the one attended by such child, and the admissions to be granted by the Board of Education in accordance with such rules and regulations as it may adopt and in accordance with the available facilities in such schools, effective for the school year beginning September, 1956" 146 F. Supp. at p. 93.

Counsel for the Board asserted "'Since that plan embraces the relief prayed for, I think that takes care of that . . .'" Id. at p. 94. Relying on the Resolution, petitioners agreed to dismiss. Ibid.

Subsequently, on August 1, 1956 respondents adopted a "Desegregation Policy." It limited Negro applicants for transfer to only the first three grades of two elementary schools in the county. Id. at p. 95.

Petitioners, therefore, on August 28, 1956, filed a fresh suit alleging that respondents were under a constitutional duty to desegregate completely and that they were estopped from retreating from their original resolution. The trial court remitted petitioners to an administrative remedy before the State Board of Education.

The petitioners (including intervenors who were granted leave to intervene, 152 F. Supp. at p. 115) filed an appeal with the State Board. While it was pending respondents again changed their policy on February 6, 1957. The new policy provided that:

> Applications for transfer will be accepted from pupils who wish to attend elementary schools in the areas where they live, if space is available in such schools. Space will be considered available in schools that were not more than 10% overcrowded as of February 1, 1957. All capacities are based on the state and national

standard of thirty pupils per classroom. 152 F. Supp. at p. 116.

Under the then newest plan five elementary schools and the sixth grade in two schools were opened. Ibid.

The State Board held that the plan had been adopted in good faith and constituted a reasonable start. Ibid.

At a hearing of this cause on April 18, 1957 the plan of February 6 was amplified to include ten elementary schools and the sixth grade in one school; as well as three elementary schools as of September 1958, when contemplated construction was projected to be completed. Three elementary schools and the sixth grade of a high school would commence receiving Negroes' applications in September, 1959.

At the April, 1957 hearing, the Court ruled tentatively that the plan was "generally satisfactory for the elementary grades but not for the high school grades." Ibid.

Another hearing was scheduled for June 11, 1957. On June 5th, the Board changed its plan once more and notified the parties of the change just before the hearing (App. p. 39a). The new plan—consisting of additions to the old—would permit Negro children to enter high school by a route additional to that of the earlier plan (whereby they could enter only through normal promotions from desegregated elementary schools). It would permit Negro children to be admitted only after special examination and evaluation for admission to nonsegregated high schools. 152 F. Supp. at 117.

This plan set forth below was incorporated into the decree of the district court and approved by the Court of Appeals judgment here under review. The trial court held

respondents estopped from denying admission to named plaintiffs in the first case and also ordered as follows (see the judgment, App. p. 18):

Most of the county's elementary classes were opened to Negro children transfer-applicants in accordance with specified transfer procedures which did not contemplate use of a racial standard. For the school year 1958-1959, Negro children might so transfer to three additional elementary schools; for the school year 1959-1960, they might transfer to still another three elementary schools and the sixth grade in a high school. The 1959-1960 elementary school change would mark the abolition of all racial restrictions in transfers among *elementary* schools in the county.

Desegregation of the county's high and junior high schools was scheduled to commence with a non-racial transfer policy in September, 1958. Thereafter Negroes' applications for transfer without regard to race would be permitted to the 8th grade in 1959; to the 9th grade in 1960; the 10th in 1961; 11th in 1962; the 12th in 1963. In 1963 and thereafter all Negro applicants to classes are scheduled to be admitted on the same basis upon which they would be admitted if they were white.

At the same time the following other Negro applicants might be permitted to transfer to high schools without regard to race: those able to meet special qualifications pertaining to probability of their individual success measured by intelligence and achievement tests, grade level achievements and other similar matters to be adjudged by a committee consisting of the principals of the schools from which the pupil is transferred and the school to which he desires to transfer, the director of instruction and the county supervisors working in the schools.

These criteria were to be applied only to Negro transfer applicants; white students might transfer without regard to these standards.

The Board took no steps to eliminate the situation in which, apart from any other school assignment standard, some schools are assigned solely to Negro children because of their race. Their approach to the constitutional requirement has been to maintain these schools while permitting those Negro children who come forward to transfer out if they come within the 1956-1963 plan.

The reasons advanced for deferring desegregation in this manner were three: (1) there was alleged fear of "bitter local opposition," 146 F. Supp. at p. 95, a recurrence of events such as had occurred in Delaware[2] (App. R. 30a) and perhaps riots (App. R. 37a). One application to a school was refused, for example, "[b]ecause it was a particularly sensitive spot." (App. R. 33a); and see (App. R. 35a); (2) there was alleged overcrowding on an "overall average" (App. R. 33a); (3) it was stated that high schools are subject-matter oriented unlike elementary schools which are pupil-oriented; that entering high school above the initial grade, during which associations and cliques form, imposes a burden of adjustment on the transferee which the faculty is not equipped to handle. 152 F. Supp. at p. 118.

A committee on facilities established by the school board had surveyed the county schools, and as to overcrowding had concluded that the overall capacity of Harford County schools is such that eight of them could receive more than 500 students in excess of the number they expected to

[2] Presumably referring to events in Milford, Delaware, which are sketched in Shoemaker (ed.), With All Deliberate Speed 40-41 (1957).

receive, and that "after carefully considering all factors at its disposal the committee is of the opinion that provision can be made to accommodate such colored students as apply for admission to Harford County public schools for the year 1956 to 1957" (App. R. 44a). The record also shows that during an earlier period of time when the school board had authorized a plan which the court and plaintiffs construed as permitting transfer of any applicant to any grade without regard to race, about sixty Negro children made such application; most of these, however, were rejected upon the adoption of other, more restrictive, standards by the respondents which are assailed in this case (App. R. 26a).

There are approximately 12,600 white and 1,400 Negro students in the county (App. R. 26a).

Negro schools in the county were overcrowded in the words of the Superintendent "about like some of the others" (App. R. 34a). "[I]f a white child applied to any of the so-called overcrowded schools he would . . . have been admitted" (App. R. 34a; see also App. R. 29a). And, of course, he would have been admitted notwithstanding problems of "pupil consciousness" or "subject consciousness" whereby all but specially approved Negroes are barred.

It will be noted that the high school "stair-step" procedure, although formulated before the 1957 school year, did not contemplate the transfer of Negro children to the seventh grade without regard to race until the 1958 school year. The school board offered no justification for this other than, in the words of the Superintendent "I can't say why, your Honor, but the policy was moving forward three years, and that was all" (App. R. 36a).

As to whether there were administrative reasons for desegregating only the 7th grade in 1958 and not the 8th

grade also, the Superintendent stated "Well, I won't say none, but at the moment, I don't think of any big one; let's put it that way" (App. R. 37a).

Reasons for Granting the Writ

The decision below conflicts with constitutional principles established by this Court.

In the *School Segregation Cases* this Court prescribed the standards by which District Courts were to review school board decisions on how and when to desegregate.[1] The *School Cases* held that "[t]he *burden rests upon the defendants* to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date" 349 U. S. 294, 300. While, of course, various questions of school administration may be considered, such as "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems," 349 U. S. at pp. 300, 301, the overriding consideration obviously is "the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis" 349 U. S. at p. 300.

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[1] These standards are unlike the typical rules for the review of administrative determinations which are provided by the Federal Trade Commission Act ("the findings of the Commission as to the facts, if supported by evidence, shall be conclusive") 15 U. S. C. A. Section 45(c) or the Administrative Procedure Act (". . . the reviewing court shall . . . hold unlawful and set aside agency action . . . unsupported by substantial evidence . . ."), 5 U. S. C. A. Section 1009(e)(B)(5).

The respondents herein failed to meet this burden. The Courts below failed to follow or apply the standards set out above. Of the problems enumerated by this Court only alleged overcrowding has been proferred by respondents as grounds for delay and the Record refutes this claim. One cannot read the Record in this case without concluding that respondents have endeavored, as assiduously as they can, to continue the segregated pattern of schools with as little change as possible for as long as they can.

1. We may exclude the alleged threats and intimidation against desegregation as grounds for delay. *Brown* v. *Board of Education*, 349 U. S. 294, 300; *Jackson* v. *Rawdon*, 235 F. 2d 93 (5th Cir., 1956) cert. denied 352 U. S. 925; *Buchanan* v. *Warley*, 245 U. S. 60. Moreover, the State of Maryland has made entirely clear that it will not at all tolerate such lawlessness, Southern School News, Nov., 1954 pp. 8-9; Dec., 1954 p. 7 (Baltimore disturbances stopped).[4]

2. No one denies that until 1963 Negro children will have to take tests not required of white children. No one denies that abolition of formerly all Negro schools—so constituted on a racial basis—is nowhere within the contemplation of respondents' plan. In this context then we may appropriately quote from *Lane* v. *Wilson*, 307 U. S. 268, 275, 276-277:

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[4] Intimations of illegal activity by this same trial court as grounds for refusing desegregation of Maryland parks because, allegedly, the "degree of racial feeling or prejudice in this State is probably higher with respect to bathing, swimming and dancing than with any other interpersonal relations except direct sexual relations," *Lonesome* v. *Maxwell*, 123 F. Supp. 193 (D. Md., 1954), rev. *sub nom. Dawson* v. *Maxwell*, 220 F. 2d 386 (4th Cir., 1955), aff'd 350 U. S. 877, have not been borne out by events. The Maryland State Commission of Forests and Parks has ordered that facilities under its jurisdiction "henceforward [shall be conducted] on an integrated basis." 1 Race Rel. L. Rep. 971 (1956).

> . . . The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.
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> . . . We believe that the opportunity thus given negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and confined. The restrictions imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise. To be sure, in exceptional cases a supplemental period was available. But the narrow basis of the supplemental registration, the very brief normal period of relief for the persons and purposes in question, the practical difficulties, of which the record in this case gives glimpses, inevitable in the administration of such strict registration provisions, leave no escape from the conclusion that the means chosen as substitutes for the invalidated "grandfather clause" were themselves invalid under the Fifteenth Amendment. They operated unfairly against the very class on whose behalf the protection of the Constitution was here successfully invoked.

The situation is like that of maintaining white and Negro waiting rooms, appropriately designated by signs which, however, may not be enforced by overt sanction which the Interstate Commerce Commission condemned in *N.A.A.C.P. v. St. Louis and San Francisco Ry. Co.*:

> Signs such as "white" and "colored", as displayed in the Broad Street Station, are commonly understood to represent rules established by managers of buildings in which they are posted in the expectation that they will be observed by persons having due regard for the proprieties. It is reasonable to believe that such was the original purpose of these signs, and that this is still true, despite the Terminal's acquiescence in disregard of the signs. 297 I. C. C. 335, 345 (1955).

3. As to overcrowding, Respondent's own Committee, which made an intensive study of the situation, concluded that the schools in question could accommodate such Negroes as might apply; in fact only 60 did apply at a time when the transfer standards purportedly allowed unlimited transfer, although under the amended restrictions adopted by Respondents only 15 of these were actually admitted. Negro schools too, were crowded.

Moreover, white children, transferring in from out of the district would have suffered no restriction because of the so-called crowding. At any rate, if there were a crowding problem a racial standard would be no way to treat it. *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2d 853 (6th Cir., 1956) cert. denied 350 U. S. 1006; *Booker* v. *Tennessee Board of Education*, 240 F. 2d 689 (6th Cir., 1957) cert. den. 353 U. S. 965.[5]

4. The postponement because of the so-called "subject-matter-mindedness" of high schools becomes patently frivo-

[5] See also *Gordon* v. *Collins*, 2 R. Rel. L. Rep. 304 (W. D. Ky., 1957) (court rejecting alleged reasons for delay which included overcrowding, transportation difficulties, reallocation problems, need for time to study the problems, unfavorable social conditions; the position of defendants is unreported); *Mitchell* v. *Pollock*, 2 R. Rel. L. Rep. 305 (W. D. Ky., 1957) (rejecting similar grounds for delay); and see, for the same considerations and holding *Garnett* v. *Oakley*, 2 R. Rel. L. Rep. 303 (W. D. Ky., 1957).

lous when considered along with the fact that the special certification requirement "may be applied only to Negro students not qualified for admission under paragraph 4," i.e., the stair-step arrangement (App. R. 3a); white children are not barred by this factor. If subject consciousness is a valid ground for barring Negro transferees above the first year (absent special certification) this would almost automatically convert all desegregation plans to at least 12 years: one can readily expect intransigent districts to call their schools "subject matter conscious" instead of "pupil conscious" thereby justifying differential racial treatment.

The postponement of desegregation of the 7th and 8th grades, as the Record indicates, was even without a proferred reason. When asked what administrative considerations entered into such a decision the superintendent replied that there were none of significance. Petitioner submits that the absence of even alleged reason for denying these fundamental rights exposes the baselessness of the other alleged justifications.

5. Although the trial judge recited that: "the burden of proof is on defendants to show that a delay during a transition period is necessary, that the reasons for the delay are reasons which the court can accept under the constitutional rule laid down by the Supreme Court, and that the proposed plan is equitable under all the circumstances," 152 F. Supp. at p. 118, its deference to the board's determination appears in its treatment of postponement of seventh grade desegregation:

> My only doubt is whether it is necessary to postpone until September, 1958, the complete desegregation of the seventh grade. But I am not charged with the responsibility of administering the Harford County public school system. Although I think the reasons given

> for the delay of one year are less satisfactory than the reasons given for the rest of the plan, a federal court should be slow to say that the line must be drawn here and cannot reasonably be drawn there, where the difference in time is short and individual rights are reasonably protected, during the transition period, as they are by the June 5, 1957 modification. 152 F. Supp. at p. 119.

It is therefore apparent that respondents herein did not meet the *burden* of establishing reasons for delay and that the court for the most part acquiesced to so-called administrative expertise. At best the Board produced some evidence which, on the whole record, it may be doubted, would have supported an ordinary administrative determination where the presumptions are all on the side of the agency. Cf. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474; *Folds* v. *F. T. C.*, 187 F. 2d 658 (7th Cir., 1951). But even more than this, we are concerned not only with an appraisal of the facts but a proper view of the law, cf. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504, involving as it does "the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis" 349 U. S. at p. 300. Insufficient regard was paid to the seriousness of this claim.

Constitutional rights were here subordinated to ineffable considerations of policy without substantial factual basis. The Court of Appeals in affirming and according the normal deference to district court findings pyramided presumption upon presumption.

As the plan now stands there are Negro children in the county, including plaintiffs, who will never see a desegregated education unless they are examined and become specially certified in a manner not required of white chil-

dren similarly situated. Given the history of the situation, and the continued maintenance of formerly colored schools as colored on solely a racial basis the deterrent effect of this special requirement is obvious; Cf. *Lane* v. *Wilson*, *supra*. At any rate the difference in treatment based on race is express and unconstitutional.

There is a conflict among the Circuits.

The Courts of Appeal of the Fourth, Sixth and Eighth Circuits have passed upon the constitutionality of desegregation plans. Moreover, a number of district courts in these circuits also have passed upon this question. While from the expectable disparity in factual situations and in trial records the cases are not clearly comparable, there is a substantial contrariety of views in application of the pertinent constitutional principles among the courts. These differences call for clarification by this Court of what it meant by "all deliberate speed" in *Brown* v. *Board of Education*, 349 U. S. 294, 301, the implementation decision.

In the instant case, in essence, the trial court's decision was epitomized by extreme deference to the School Board's plan, with little or no support in the record.[6] In the same vein and cited by the Court of Appeals herein is *Aaron* v. *Cooper*, 243 F. 2d 361 (C. A. 8th, 1957). This decision relied upon a complex of administrative considerations (ap-

[6] In the Fourth Circuit a series of West Virginia District Court cases involving plans, overcrowding, fiscal problems, and time for consideration, have been rejected as grounds for delay when it was clear that Negro children could be admitted notwithstanding the proffered reasons for deferment. *Shedd* v. *Board of Education of County of Logan*, 1 R. Rel. L. Rep. 521 (S. D. W. Va., 1956); *Dunn* v. *Board of Education of Greenbrier*, 1 R. Rel. L. Rep. 319 (S. D. W. Va., 1956); *Taylor* v. *Board of Education of County of Raleigh*, 1 R. Rel. L. Rep. 321 (S. D. W. Va., 1956); *Pierce* v. *Board of Education of Cabell County* (S. D. W. Va., 1956, unreported).

parently not contradicted in the record as in the *Harford County* case now before this court). It held that a seven-year stair-step desegregation plan did not deny fundamental Fourteenth Amendment rights.

On the other hand, an entirely different view has been taken by the Sixth Circuit in *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2d 853 (6th Cir., 1956), cert. denied 350 U. S. 1006. The Court of Appeals held that where, as here, white children were not denied admission because of alleged overcrowding, desegregation could not be delayed for that reason. While the *Clemons* case involved, in addition to constitutional considerations, a question of validity under state law, it is to be noted that the court's opinion rests principally on the importance of the constitutional rights involved. Similarly, in *Booker* v. *Tennessee Board of Education*, 240 F. 2d 689 (6th Cir., 1957), cert. denied 353 U. S. 965, a five-year stair-step plan involving Tennessee's collegiate education was rejected. Alleged overcrowding was treated as a spatial problem, not a racial one. The board, it was held, might act to remedy the situation but could not treat it by a color standard. The *Booker* case, while not involving elementary or high school education, applied the standards of *Brown* v. *Board of Education*.[7]

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[7] Cf. the following district court cases in this (the Sixth) circuit: *Willis* v. *Walker*, 136 F. Supp. 177 (W. D. Ky., 1955) the court pointed out that "no white children either before or after the application for admission of the plaintiffs, were denied admission"; and that "good faith alone is not the test. There must be 'compliance at the earliest practicable date.'" 136 F. Supp. at p. 181. Desegregation was ordered by the next school year. See also *Gordon* v. *Collins*, 2 R. Rel. L. Rep. 304 (W. D. Ky., 1957); *Mitchell* v. *Pollock*, 2 R. Rel. L. Rep. 305 (W. D. Ky., 1957); *Garnett* v. *Oakley*, 2 R. Rel. L. Rep. 303 (W. D. Ky., 1957). (all summarily described *op. cit. supra*, n. 5)

CONCLUSION

The evil of racial segregation still permeates respondent's plan. Little effort has been made towards faithfully complying with this Court's holding that state created racial distinctions must be eliminated from public education. Every effort has been made to continue the overall pattern with as little desegregation as possible so that nonsegregation would be the exception rather than the rule.

Now, three years following this Court's implementation decision in *Brown* v. *Board of Education*, respondents submit that it is time to clarify whether such departure from prior segregation affords full equality which the United States Constitution secures.

WHEREFORE for the foregoing reasons it is prayed that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

PER CURIAM:

This is an appeal in a school segregation case involving the public schools of Harford County, Maryland. The school board of the county had adopted a plan for the gradual desegregation of elementary schools over a two year period and high schools over a period of five years. At the suggestion of the District Judge, the plan was amended to provide for the transfer of qualified students in high school grades pending the final elimination of segregation in those grades. As so amended the plan was approved by the judge and a decree was entered enforcing it and making special provision for the admission of two Negro children who had been parties to a prior action. The facts are fully set forth in the opinion of the District Judge, and we think that his discretion was properly exercised for reasons adequately stated in the opinion, to which nothing need be added. See *Moore* v. *Board of Education of Harford County*, 152 F. Supp. 114. See also *Allen et al.* v. *County School Board of Prince Edward County, Va.*, 4 Cir. 249 F. 2d 462, 465; *Rippy* v. *Borders*, 5 Cir. F. 2d ; *Aaron* v. *Cooper*, 8 Cir. 243 F. 2d 361.

Affirmed.

Judgment

This cause having come on for final hearing by the court without a jury on June 11, 1957 and the court having heard all the evidence adduced and being fully advised in the premises, it is hereby ordered, adjudged and decreed as follows:

1. Defendants now and hereafter shall accept applications for admission or transfer to all elementary classes under their control (except in the schools named in paragraph 2 as to which applications will be accepted as described in that paragraph), in accordance with rules and regulations set forth in paragraph 3 and every Negro child's application to classes governed by the instant paragraph shall be considered and granted on the basis upon which it would be considered and granted if he were white.

2. Defendants shall accept Negro children's applications for admission or transfer to Old Post Road, Bel Air and Highland elementary schools for the school year 1958-1959 and thereafter; and shall accept Negro children's applications for admission or transfer to Forest Hill, Jarrettsville and Dublin elementary schools and the sixth grade at Edgewood High School for the school years 1959-1960 and thereafter. Every Negro child's application to the schools named in this paragraph for the respective school years specified herein and thereafter shall be considered and granted on the basis upon which it would be considered and granted if he were white.

3. All applications for transfer to elementary classes shall be made during the month of May on a regular application form furnished by the Board of Education and must be approved by the applicant's classroom teacher and

the principal of the school he applicant attends. Such applications will be reviewed at the regular June meeting of the Board of Education. Applicants and their parents will be informed of the action taken on applications prior to the close of school in June of each year. In no event shall a Negro child's application for admission or transfer be rejected if it would have been granted had he been white.

4. A Negro child's application for admission or transfer to seventh grade classes commencing September, 1958, and thereafter, under defendant's control shall be considered and granted on the basis upon which it would be considered and granted if he were white. Such applications to the following classes shall be so treated during and after the year set forth alongside the class, as follows:

eighth grade	— 1959
ninth grade	— 1960
tenth grade	— 1961
eleventh grade	— 1962
twelfth grade	— 1963

In 1963 and thereafter all Negro applicants to all classes shall be admitted on the same basis upon which they would be admitted if they were white.

5. Commencing September, 1957 applications for admission or transfer by Negro children not qualified for admission or transfer under paragraph 4 to high schools under defendants' control will be considered and granted if the applicants fulfill special qualifications pertaining to the probability of success of each individual pupil. These qualifications will be measured by intelligence and achievement tests, grade level achievements and other similar matters to be adjudged by a committee consisting of the principals of the schools from which the pupil is transfer-

ring and the school to which he desires to transfer, the Director of Instruction and the county supervisors working in these schools. Apart from the fact that these conditions may be applied only to Negro students not qualified for admission under paragraph 4 no racial distinction is to be made in the administration of these tests and evaluations. Such applications may be made to the Board of Education between July 1 and July 15 of 1957 and years following in which these tests may be given.

6. Infant plaintiff Moore shall be admitted to the sixth grade at the Bel Air School. Infant plaintiff Spriggs shall be admitted to the eighth grade at Edgewood High School.

7. No racial distinctions whatsoever shall be made by defendants in treating Negro children who have been admitted to schools pursuant to this decree.

8. This Court retains jurisdiction for the purpose of granting any other relief that may become necessary.

District Court Opinion of November 23, 1956

THOMSEN, *Chief Judge*:

This action, brought by four Negro children seeking admission to certain public schools in Harford County, Maryland, present: (1) the usual questions under *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873; Id., 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083; (2) the same questions of law which were raised by the defendants in *Robinson* v. *Board of Education*, D. C. D. Md., 143 F. Supp. 481; and (3) a problem of equitable estoppel arising out of a previous action brought by the plaintiffs herein and others against the defendants herein, which was dismissed by the plaintiffs in reliance upon a resolution adopted by the defendants, the Board of Education of Harford County.

FACTS

Harford County is predominately rural, but in the southern portion of the county there are two large government reservations, the Aberdeen Proving Ground at Aberdeen, and the Army Chemical Center at Edgewood. On these reservations there are non-segregated housing developments.

There are approximately 12,600 white students and 1,400 Negro students in the public schools of Harford County. The defendant Board of Education operates a 6-3-3 system; that is, 6 years of elementary school, 3 years of junior high and 3 years of senior high. The white high schools, at Bel Air, Bush's Corner (North Harford), Edgewood, Aberdeen, and Havre de Grace, are combination junior-senior high schools; the colored schools, at Hickory and Havre de Grace, are "consolidated schools", comprising elementary, junior high and senior high classes.

On June 30, 1955, just one month after the second opinion in *Brown* v. *Board of Education*, the Board of Education of Harford County selected a Citizens Consultant Committee of thirty-six members from all sections of the county, five of whom were Negroes, to consider the problem of desegregation of the public schools in Harford County and to make recommendations to the Board of Education.

On July 27, 1955, a group of Negro parents petitioned the Board of Education, calling upon them "to take immediate steps to reorganize the public schools under your jurisdiction on a nondiscriminatory basis."

The Citizens Consultant Committee held its first meeting on August 15, 1955, and was split up into a number of sub-committees, to consider facilities, transportation and social relationships respectively. A member of the staff of the Board of Education served as consultant to each sub-committee. The sub-committees met at various times during the rest of the year 1955 and the first two months of 1956.

On November 29, 1955, the four infant plaintiffs in the instant case, together with seventeen other Negro children, through their parents and next friends, brought suit in this court against the defendants herein (Civil Action No. 8615), alleging that the Board had "refused to desegregate the schools within its jurisdiction and has not devised a plan for such desegregation," and praying that:

> "1. The court advance this cause on the docket and order a speedy hearing of the application for preliminary injunction and the application for permanent injunction according to law and that upon such hearings:
>
> "2. The Court enter preliminary and permanent judgments that any orders, customs, practices, and usages pursuant to which said plaintiffs are segre-

gated in their schooling because of race, violate the Fourteenth Amendment to the United States Constitution.

"3. The Court issue preliminary injunctions ordering the defendants to promptly present a plan of desegregation to this Court which will expeditiously desegregate the schools in Harford County and forever restrain and enjoin the defendants and each of them from thereafter requiring these plaintiffs and all other Negroes of public school age to attend or not to attend public schools in Harford County because of race.

"The Court allow plaintiffs their costs and such other relief as may appear to the Court to be just."

On February 27, 1956, the Citizens Consultant Committee held a meeting, at which all of the sub-committees presented their final reports, and the full committee unanimously adopted the following resolution:

"To recommend to the Board of Education for Harford County that any child regardless of race may make individual application to the Board of Education to be admitted to a school other than the one attended by such child, and the admissions to be granted by the Board of Education in accordance with such rules and regulations as it may adopt and in accordance with the available facilities in such schools; effective for the school year beginning September, 1956."

On March 7, 1956, the Board of Education of Harford County adopted the resolution as submitted by the Citizens Consultant Committee.

On March 9, 1956, Civil Action No. 8615 came on for hearing before me on defendants' motion to dismiss the

complaint, pursuant to Rule 12(b), Fed. Rules Civ. Proc. 28 U. S. C. A. At the beginning of the hearing, counsel for defendants advised the court that the Board of Education of Harford County had "approved or adopted" the recommendation offered by the Citizens Consultant Committee and read the resolution into the record. He then said: "Since that plan embraces the relief prayed for, I think that takes care of that, and I want to call that to Your Honor's attention." Counsel for plaintiffs then said: "We are in a position to enter into a consent decree embodying the terms of this resolution. We would like to discuss it, but I do not think there is any need for further litigation." Counsel for the defendants replied: "I do not think that the Court should enter a consent decree when the relief prayed for is the policy adopted by the Board. I think the complaint should be dismissed in open court because there is really nothing before the Court to effectuate." I then left the bench so that counsel could discuss the matter more freely. When court reconvened the following colloquy took place:

> "Mr. Greenberg: We discussed this resolution that has been adopted by the School Board and we have told counsel for the defendants that we are sure they are proceeding in good faith and this plan is acceptable to us, and we will dismiss our suit and make that a matter of record in open court, and file this.
>
> "Mr. Barnes: That's agreeable to the defendants, your Honor.
>
> "The Court: I think it would be well to have the record show that in view of the fact that you have been presented with this you offered to dismiss the suit, and attach this paper as an exhibit.
>
> "Mr. Greenberg: Yes, sir.
>
> "The Court: I am very happy this has worked out in a very satisfactory way."

The following stipulation, signed by counsel for all parties, was filed in the case on the same day:

"Dismissal of Action

"1. This cause came to be heard in this Court on motion to dismiss the 9th day of March, 1956.

"2. Defendants, by their counsel, presented to the Court the attached Resolution of the Harford County Citizens Consultant Committee, adopted by the Harford County Board of Education, as submitted, at its regular meeting on March 7, 1956.

"3. Relying upon said resolution, as adopted, plaintiffs hereby withdraw their complaint, and pray that the same be dismissed, costs to be paid by plaintiffs."

To this stipulation was attached a certified copy of the resolution recommended by the Citizens Consultant Committee and adopted by the Harford County Board of Education.

On June 6, 1956, the Board of Education adopted the following "Transfer Policy", which all parties agree was reasonable:

"If a child desires to attend a school other than the one in which he is enrolled or registered, it will be necessary for his parents to request a transfer. Applications for transfer are available on request. These requests should be addressed to the Board of Education, c/o Superintendent of Schools, Bel Air, Maryland. Applications will be received by the Board of Education between June 15 and July 15, 1956. All applications for transfer must state the reason for the request, and must be approved by the principal of the school which the pupil is now attending.

"Applications for transfer will be handled through the usual and normal channels now operating under the jurisdiction of the Board of Education and its executive officer, the Superintendent of Schools.

"While the Board has no intentions of compelling a pupil to attend a specific school or of denying him the privilege of transferring to another school, the Board reserves the right during the period of transition to delay or deny the admission of a pupil to any school, if it deems such action wise and necessary for any good and sufficient reason.

"All applications for transfer, with recommendations of the Superintendent of Schools, will be submitted to the Board of Education for final consideration at the regular meeting of the Board on Wednesday, August 1, 1956. When requests for transfer are approved, parents must enroll their child at the school on the regular summer registration date, Friday, August 24, 1956."

The transfer policy was advertised in all newspapers published in Harford County. Sixty applications for transfer of Negro pupils were submitted within the time specified.

On August 1, 1956, the Board of Education of Harford County adopted a "Desegregation Policy", embodied in a document which recites the appointment of the Citizens Consultant Committee, the recommendation made by that Committee, the resolution adopted by the Board of Education on March 7, 1956, and the transfer policy adopted by the Board in June. The statement of Desegregation Policy continued as follows:

"The Supreme Court decision, which required desegregation of public schools, provided for an orderly, gradual transition based on the solution of varied

local school problems. The resolution of the Harford County Citizens Consultant Committee is in accord with this principle. The report of this committee leaves the establishment of policies based on the assessing of local conditions of housing, transportation, personnel, educational standards, and social relationships to the discretion of the Board of Education.

"The first concern of the Board of Education must always be that of providing the best possible school system for all of the children of Harford County. Several studies made in areas where complete desegregation has been practiced have indicated a lowering of school standards that is detrimental to all children. Experience in other areas has also shown that bitter local opposition to desegregation in a school system not only prevents an orderly transition, but also adversely affects the whole educational program.

"With these factors in mind, the Harford County Board of Education has adopted a policy for a gradual, but orderly, program for desegregation of the schools of Harford County. The Board has approved applications for the transfer of Negro pupils from colored to white schools in the first three grades in the Edgewood Elementary School and the Halls Cross Roads Elementary School. Children living in these areas are already living in integrated housing, and the adjustments will not be so great as in the rural areas of the county where such relationships do not exist. With the exception of two small schools, these are the only elementary buildings in which space is available for additional pupils at the present time.

"Social problems posed by the desegregation of schools must be given careful consideration. These can be solved with the least emotionalism when younger children are involved. The future rate of expansion

of this program depends upon the success of these initial steps."

Pursuant to the Desegregation Policy so adopted, fifteen of the sixty applications were granted, and forty-five, including those of the infant plaintiffs in the instant case, were refused. On August 7, 1956, the defendant Charles W. Willis, Superintendent of Schools, sent the following letter to the parents of each of the infant plaintiffs:

> "The Board of Education, at its regular August meeting, adopted a policy for the desegregation of Harford County schools. Under the provisions of this policy your child will not be allowed to transfer from his present school. Your request for a transfer has been refused by the Board of Education.
>
> "A copy of the desegregation policy is enclosed."

Neither the infant plaintiffs nor their parents appealed to the State Board of Education from the action of the County Superintendent denying their requests for transfer. Nor have any appeals been filed by or on behalf of any of the other Negro children whose requests for transfer were refused.

On August 28, 1956, the four infant plaintiffs by their parents and next friends filed the instant suit, pursuant to Rule 23(a)(3), "for themselves and on behalf of all other Negroes similarly situated", alleging most of the facts set out above and other facts, some of which are disputed, which need not be detailed at this time.

Infant plaintiff Moore seeks transfer from the Central Consolidated Elementary School in Hickory to the elementary school in Bel Air, where he resides; Spriggs seeks transfer from the school in Hickory to the High School (junior high) in Edgewood, where he resides; Slade and

Garland seek transfer from the Havre de Grace Consolidated School to the Aberdeen High School (9th and 11th grades respectively). They pray that:

> "1. The Court advance this cause on the docket and order a speedy hearing of the application for preliminary injunction and application for permanent injunction according to law and that upon such hearing;
>
> "2. The Court enter preliminary and permanent judgments, that any orders, customs, practices and usages pursuant to which said plaintiffs are each of them, their lessees, agents and successors in office from denying to plaintiffs and other Negro residents of Harford County of the State of Maryland admission to any Public School operated and maintained by the Board of Education of Harford County, on account of race and color." (sic)

Defendants filed a motion to dismiss the complaint pursuant to Rule 12(b), raising substantially the same points which were considered in *Robinson v. Board of Education of St. Mary's County, supra*. I overruled that motion on October 5, 1956. Defendants filed their answer on October 24, and the case was set for hearing on November 14. Both sides offered testimony and documentary evidence. From the testimony it appears that most, but not all, of the schools in Harford County are overcrowded if the "standards" or "goals" set out by the State are considered, namely, an average of 30 per class in elementary schools and 25 per class in secondary schools. But defendants conceded that any white children moving into the county would be admitted to the appropriate white school, however crowded. The factors considered by the Board of Education in adopting the August 1 Desegregation Policy were discussed at some length. The President of the Board of Education and

the County Superintendent testified that they did not consult counsel before adopting the August 1 Desegregation Policy, but that they thought this policy was in accord with the recommendation of the Citizens Consultant Committee and with the March 7 resolution adopted by the Board.

Plaintiff's counsel do not charge bad faith against either the Board or the Superintendent, but contend that:

"I. The Harford County School Board Resolution of March 7, 1956, meant that from the following school year and thereafter there would be no legally compelled racial segregation of school children in Harford County;

"II. The defendants are estopped from any further delay in complete integration by their action in causing plaintiffs to withdraw plaintiffs' original suit in reliance on the Board's resolution, which resolution was expressly incorporated by reference into the court's order of dismissal;

"III. Plaintiffs are entitled to judicial rather than administrative relief at this time in view of the history and facts of this case;

"A. Defendants, by their actions, are estopped from asserting the doctrine of administrative exhaustion as a defense;

"B. Even if defendants were not estopped from raising the defense of the doctrine of administrative exhaustion, the defense would nevertheless fail as the doctrine is not here applicable;

"IV. Even if defendants could validly raise the questions of necessary administrative delay, their own actions clearly demonstrate the fact that no additional time is needed to solve administrative problems;

"A. Defendants are administratively ready to effectuate desegregation;

"B. 'Community unreadiness' constitutes no legal justification for continued segregation."

Discussion

[1] The Maryland statutes and decisions were analyzed in *Robinson* v. *Board of Education of St. Mary's County*, *supra*, 143 F. Supp. at pages 487-491. I adhere to that analysis, and it need not be repeated here. It is clear that some of the factors considered by defendants in the instant case when they adopted the August 1 Desegregation Policy, and some of the points argued by counsel for plaintiffs in opposition thereto, involve administrative problems, over which the State Board of Education has jurisdiction, and which should be appealed to that Board under the Maryland authorities. Some of the other factors and points involve legal questions, which under Maryland law are for the courts. Most, if not all, involve both administrative and legal problems. Even the estoppel point is a mixed question, because the March 7 resolution leaves open at least the question of available facilities, whatever other matters may have been foreclosed.

Whether the court should attempt to segregate the legal questions and decide them at this time, or should defer any decision until the State Board has been given an opportunity to pass on the problem as an integrated whole, is a matter of comity and discretion. Since, at the time of the hearing in the *St. Mary's County* case, the State Board assured the court that it will give prompt attention to any appeal filed by or on behalf of Negro students, I am satisfied that I should not make a final decision in this case until the plaintiffs have appealed to the State Board from the action of the County Superintendent denying their applica-

tions for transfer. *Brown* v. *Board of Education*, 349 U. S. 294, 75 S. Ct. 753; *Hood* v. *Board of Trustees of Sumter County School District No. 2*, 4 Cir., 232 F. 2d 626; *Carson* v. *Board of Education of McDowell County*, 4 Cir., 227 F. 2d 789; *Robinson* v. *Board of Education of St. Mary's County*, D. C. D. Md., 143 F. Supp. 481. However, the final decision in this court, if one is necessary after the State Board has acted, should be rendered within such time that the losing parties may have an appeal heard by the Court of Appeals for the Fourth Circuit at its June, 1957 term.

Conclusions

[2] 1. The appointment of the Citizens Consultant Committee in the summer of 1955, its study, resulting in its recommendation to the Board of Education, and the resolution adopted by the Board on March 7, 1956, were a prompt and reasonable start toward compliance with the Supreme Court ruling.

2. I intimate no opinion at this time with respect to the sufficiency or propriety of the Desegregation Policy adopted by the Board on August 1, 1956.

3. I will enter a decree dismissing this action unless the plaintiffs appeal to the State Board of Education on or before December 15, 1956, from the action of the County Superintendent refusing their applications for transfer. If plaintiffs enter such an appeal, I will stay further proceedings in this case until the State Board shall have decided the appeal or shall have delayed decision for an unreasonable time; provided that after the State Board shall have rendered its decision, or after March 1, 1957, whichever is earlier, either plaintiffs or defendants may request the court to set this case for further argument and prompt decision.

District Court Opinion of June 20, 1957

THOMSEN, *Chief Judge*:

This action was brought by four Negro children, on their own behalf and on behalf of those similarly situated, seeking admission to certain public schools in Harford County, Maryland. The background and first stages of the case are detailed in an opinion filed herein on November 23, 1956, D. C., 146 F. Supp. 91.

Following that opinion, the four plaintiffs and eight other children, who have asked and been granted leave to intervene in this case, filed appeals with the State Board of Education from the refusal of the Superintendent of Schools of Harford County to grant their applications for transfer from consolidated schools for colored children to various white schools which were not desegregated in September, 1956.

While those appeals were pending before the State Board, on February 6, 1957, the Harford County Board adopted the following "Extension of the Desegregation Policy for 1957-1958":

> "Applications for transfers will be accepted from pupils who wish to attend elementary schools in the areas where they live, if space is available in such schools. Space will be considered available in schools that were not more than 10% overcrowded as of February 1, 1957. All capacities are based on the state and national standard of thirty pupils per classroom.
>
> "Under the above provision, applications will be accepted for transfer to all elementary schools except Old Post Road, Forest Hill, Bel Air, Highland, Jarrettsville, the sixth grade at the Edgewood High School, and Dublin. Such applications must be made

during the month of May on a regular application form furnished by the Board of Education, and must be approved by both the child's classroom teacher and the principal of the school the child is now attending.

"All applications will be reviewed at the regular June meeting of the Board of Education and pupils and their parents will be informed of the action taken on their applications prior to the close of school in June, 1957."

After a hearing, the State Board dismissed the appeals, finding that "the Harford County Board acted within the policy established by the State Board", that "the County Superintendent acted in good faith within the authority set forth in the August 1, 1956, Desegregation Policy adopted by the County Board",[1] that the Desegration Policy was adopted in a bona fide effort to make a reasonable start toward actual desegregation of the Harford County public schools", and that "this initial effort [the desegregation of three grades in two elementary schools] has been carried out without any untoward incidents". The State Board also took "cognizance of the resolution of the County Board of February 6, 1957", set out above herein, "as well as the testimony to the effect that the proposed Harford County Junior College, which is to be established in Bel Air in the fall of 1957, will open on a desegregated basis, and also the testimony to the effect that the present program of new buildings and additions will make further desegregation possible".

After the decision of the State Board, plaintiffs set this case for further hearing, as provided in the earlier decree, 146 F. Supp. at page 98. That hearing was held on April 18, 1957. Charles W. Willis, the Harford County Super-

[1] See 146 F. Supp. at page 95.

intendent, explained and amplified the February 6, 1957 resolution of the County Board. The President of the Board and its counsel accepted that interpretation. So explained and amplified, the plan was substantially the same as the plan which was later adopted by the County Board on May 1, 1957, as follows:

> "The Board reviewed its desegregation policy of February 6, 1957. In accordance with this plan, the following elementary schools will be open in all six grades to Negro pupils at the beginning of the 1957-1958 school year:
>
> "Emmorton Elementary School
> "Edgewood Elementary School
> "Aberdeen Elementary School
> "Halls Cross Roads Elementary School
> "Perryman Elementary School
> "Churchville Elementary School
> "Youth's Benefit Elementary School
> "Slate Ridge Elementary School
> "Darlington Elementary School
> "Havre de Grace Elementary School
> "6th Grade at Aberdeen High School
>
> "Schools now under construction or contemplated for construction in 1958, if no unforeseen delays occur, will automatically open all elementary schools to Negro pupils by September, 1959. As a result of new construction, the elementary schools at Old Post Road, Bel Air, and Highland will accept applications for transfer of Negro pupils for the school year beginning in September, 1958. Forest Hill, Jarrettsville, Dublin and the sixth grade at the Edgewood High School would receive applications for the school year beginning in September, 1959.

"As a normal result of this plan, sixth grade graduates will be admitted to junior high schools for the first time in September, 1958 and will proceed through high schools in the next higher grade each year. This will completely desegregate all schools of Harford County by September, 1963.

"The Board will continue to review this situation monthly and may consider earlier admittance of Negro pupils to the white high schools if such seems feasible. The Board reaffirmed its support of this plan as approved by the State Board of Education."

At the April, 1957 hearing, I ruled tentatively that the plan was generally satisfactory for the elementary grades, but not for the high school grades, and suggested that the parties attempt to agree on a modified plan. Conferences between counsel were held, but no agreement was reached. The County Board, however, on June 5, 1957 modified the plan as follows:

"The Board reaffirmed its basic plan for the desegregation of Harford County Schools, but agreed to the following modification for consideration of transfers to the high schools during the interim period while the plan is becoming fully effective.

"Beginning in September, 1957, transfers will be considered for admission to the high schools of Harford County. Any student wishing to transfer to a school nearer his home must make application to the Board of Education between July 1 and July 15. Such application will be evaluated by a committee consisting of the high school principals of the two schools concerned, the Director of Instruction, and the county supervisors working in these schools.

"These applications will be approved or disapproved on the basis of the probability of success and

adjustment of each individual pupil, and the committee will utilize the best professional measures of both achievement and adjustment that can be obtained in each individual situation. This will include, but not be limited to, the results of both standardized intelligence and achievement tests, with due consideration being given to grade level achievements, both with respect to ability and with respect to the grade into which transfer is being requested.

"The Board of Education and its professional staff will keep this problem under constant and continuous observation and study."

The modified plan was presented to the court at a hearing on June 11, 1957. It was made clear that when an elementary school has been desegregated, all Negro children living in the area served by that school will have the same right to attend the school that a white child living in the same place would have, and the same option to attend that school or the appropriate consolidated school that a white child will have. The same rule will apply to the high schools, all of which operated at both junior high and senior high levels, as they become desegregated, grade by grade. Of course, the County Board will have the right to make reasonable regulations for the administration of its schools, so long as the regulations do not discriminate against anyone because of his race; the special provisions of the June 5, 1957 resolution will apply only during the transition period.

[1] Willis also testified that the applications which will be made pursuant to the June 5, 1957 modification will be approved or disapproved on the basis of educational factors, for the best interests of the student, and not for other reasons. I have confidence in the integrity, ability and fairness of Superintendent Willis and of the principals,

supervisors and others who will make the decisions under his direction. In the light of that confidence, I must decide whether the modified plan meets the tests laid down in the opinions of the Supreme Court and of the Fourth Circuit,[2] with such guidance as may be derived from other decisions.[3] The burden of proof is on defendants to show that a delay during a transition period is necessary, that the reasons for the delay are reasons which the court can accept under the constitutional rule laid down by the Supreme Court, and that the proposed plan is equitable under all the circumstances. In considering whether defendants have met that burden, the court must recognize that each county has a different combination of administrative problems, traditions and character. Many counties are predominantly rural, others suburban; some have large industrial areas or military reservations. See 146 F. Supp. at page 92.

[2] Eleven out of the eighteen elementary schools in Harford County will be completely desegregated in September, 1957, three months from now. Three more will be completely desegregated in 1958, and the remaining four in 1959. The reason for the delay in desegregating the seven schools is that the county board and superintendent believe that the problems which accompany desegregation can best be solved in schools which are not overcrowded and where the teachers are not handicapped by having too many children in one class. That factor would not justify unreasonable delay; but in the circumstances of this case

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[2] Brown v. Board of Education, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083; Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873; Carson v. Warlick, 4 Cir., 238 F. 2d 724; Carson v. Board of Education of McDowell County, 4 Cir., 227 F. 2d 789.

[3] Aaron v. Cooper, D. C. E. D. Ark., 143 F. Supp. 855; Kelley v. Board of Education of the City of Nashville, M. D. Tenn., 2 Race Rel. L. Rep. 21 (1957). Cf. Mitchell v. Pollock, W. D. Ky., 2 Race Rel. L. Rep. 305 (1957).

it justifies the one or two years delay in desegregating the seven schools.

With respect to the high schools, other factors are involved. Superintendent Willis testified that when a child transfers to a high school from another high school he faces certain problems which do not arise when he enters the seventh grade, which is the lowest grade in the Harford County high schools. After a year or so in the high schools social groups, athletic groups and subject-interest groups have begun to crystallize, friendships and attachments have been made, cliques have begun to develop. A child transferring to the school from another high school does not have the support of a group with whom he has passed through elementary school. A Negro child transferring to an upper grade at this time would not have the benefit of older brothers, sisters or cousins already in the school, or parents, relatives or friends who have been active in the P. T. A. High school teachers generally, with notable exceptions, are less "pupil conscious" and more "subject conscious" than teachers trained for elementary grades, and because each teacher has the class for only one or two subjects, are less likely to help in the readjustment. The Harford County Board had sound reasons for making the transition on a year to year basis, so that most Negro children will have a normal high school experience, entering in the seventh grade and continuing through the same school. But I was unwilling in April to approve a plan which would prevent all Negro children now in the sixth grade or above from ever attending a desegregated high school.

However, the modified plan adopted on June 5, 1957, permits any Negro child to apply next month for transfer to a presently white high school, and if his application is granted, to be admitted in September, 1957, three months hence. This plan is different from any to which my atten-

tion has been called or about which I have read. It is an equitable way of handling the transition period. My only doubt is whether it is necessary to postpone until September, 1958, the complete desegregation of the seventh grade. But I am not charged with the responsibility of administering the Harford County public school system. Although I think the reasons given for the delay of one year are less satisfactory than the reasons given for the rest of the plan, a federal court should be slow to say that the line must be drawn here and cannot reasonably be drawn there, where the difference in time is short and individual rights are reasonably protected, during the transition period, as they are by the June 5, 1957 modification.

[3] Plaintiffs are obviously worried whether the June 5 plan will be carried out in good faith, or whether it will be used as a means of postponing the admission of Negro children into the high schools without proper justification. Although, as I have said, I have confidence in Superintendent Willis and his staff, plaintiffs' doubts are not unreasonable in view of the past history of this litigation. I will, therefore, enter a decree which will spell out the rights of individual children under the plan, and will retain jurisdiction of the case, so that if any child or his parents feel that his application has been rejected for a reason not authorized by the modified plan, a prompt hearing may be granted.

There remains the question of estoppel, based upon the resolution adopted by the County Board on March 7, 1956, and the interpretation of that resolution by its counsel in open court in the earlier Harford County case, as a result of which the plaintiffs therein dismissed their action. The facts on this point are set out fully in 146 F. Supp. 93 et seq.

[4] The March 7, 1956 resolution was somewhat ambiguous, but, as it was interpreted by defendants' counsel in open court, plaintiffs were justified in believing, as I did, that applications for transfer would be considered without regard to the race of the applicant. The County Board interpreted it differently in the statement entitled "Desegregation Policy" adopted on August 1, 1956; see 146 F. Supp. at page 95. I cannot accept the interpretation adopted by the County Board, but I find that it was adopted as a result of a mistake and not as the result of any bad faith on the part of the Board, the Superintendent, or their counsel. The Board adopted the Desegregation Policy of August, 1956, in the honest belief that it was to the best interests of all of the children in the County. Pursuant to that policy the Superintendent admitted fifteen Negro children to two previously white schools, but denied admission to forty-five others, including the infant plaintiffs herein.

There is grave doubt whether a governmental agency such as a county school board can be estopped from adopting a policy, otherwise legal, which it believes to be in the best interests of all the people in the County. In the instant case it would be inequitable and improper, on the ground of estoppel, to require the County Board to open all schools to Negroes immediately, as requested in the complaint. The County Board should not be foreclosed by the facts which I have found from taking such actions, and adopting and modifying such policies, as it believes to be in the best interest of the people in the County, so long as those actions and those policies are constitutional.

[5] The individual plaintiffs in the earlier case, however, were prevented from pressing their individual rights in this court and on appeal by the adoption of the March 7, 1956 resolution and by what took place in this court

in that case. See 146 F. Supp. 93 et seq. Two of those infant plaintiffs are before the court in this case, and their counsel urge that their individual rights, as well as any class rights, be enforced. The reasons which prevent an estoppel against the County Board so far as its general policies are concerned, do not apply with equal force to the individual claims of those two children. It would not be equitable to delay any further the enforcement of their individual rights.

I will, therefore, include in the decree a provision enjoining the County Board from refusing to admit Stephen Moore and Dennis Spriggs to whatever school would be appropriate for them if they were white.